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UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

REGION V

In The Matter of:	)	
	)	
EDWIN COOPER, INC.	)	DOCKET NO. V-W-84-007
	)	
	)	

Pursuant to the opportunity to provide written comments offered in the order, Edwin Cooper provides the following written comments.

The order is entirely unnecessary in that in large part it merely orders Edwin Cooper, Inc. to undertake actions that Edwin Cooper, Inc. has previously stated orally and in writing that it was willing to do voluntarily. However, because the order prohibits Edwin Cooper, Inc. from carrying out the first of those actions, it is not only unnecessary but also counterproductive. The prohibition against those first actions is particularly inappropriate because Edwin Cooper, Inc. has already provided the material required for the actions to proceed. Rather than review those materials, EPA has done an idle thing and ordered that they be produced.

Because of Edwin Coooper, Inc.'s interest in undertaking certain remedial activities, these comments turn first to the prohibitory portions of the order, and then to the mandatory portions of the order, in the hope that the terms can be modified to achieve a satisfactory environmental result. We also comment on other portions of the order, including the jurisdictional basis.

Paragraph 12(E)

This paragraph in essence prohibits Edwin Cooper, Inc. from completing its construction project N-071 unless certain plans are submitted and approved by EPA.

Since these plans have previously been submitted to EPA, the simplest solution is for EPA to approve those plans, or immediately provide substantial comments to them.

Since the project is simple, the plans are quite simple. The plans do not require complicated engineering drawings nor difficult engineering judgments in review and can be reviewed and approved immediately.

First of all, at EPA's request, the document dated March 1, 1984, which is referenced in the order, was modified to include a detailed breakdown of the construction steps necessary to complete the work. This revised document, dated May 1, 1984 and attached hereto, was given to EPA on May 3, 1984. Although EPA had the time to prepare and issue this ex parte order after the meeting on May 3, 1984, it apparently has not had the time or inclination to review or comment on the revised document or even to recognize its existence.

Subparagraph E(i) requires Edwin Cooper, Inc. to conduct further soil sampling in areas to be covered with asphalt or concrete or artificial covering pursuant to a sampling plan approved by EPA. That sampling plan, prepared after consultation and agreement by EPA's on-scene coordinator (OSC), was delivered to EPA's OSC on May 16, 1984. However, the order does not acknowledge the delivery or offer any substantive criticism of that plan.

Subparagraph E(ii) requires a plan for placing soil in the area around tanks T900-905. Considering the simplicity of the project, this "plan" is not complicated. One of the things addressed in the May 1, 1984 revised project description was this plan for placing soil in the area around the tanks. We are genuinely mystified as to what more of substance needs to be added to the description of the project to satisfy subparagraph E(ii)'s plan requirement. After discussing this subparagraph with two EPA assistant regional counsels, Edwin Cooper, Inc. has prepared and attached as Exhibit A, a revised project description covering such details as the thickness of concrete, the dimensions of the vault, and the volume of earth to be moved. Although we have supplied the information requested, we doubt that the additional information will have any bearing on the decision to approve the "plan".

Subparagraph E(ii) also prohibits "disposal" of contaminated soil at the site unless Edwin Cooper, Inc. complies with all applicable federal or state rules, including 40 CFR part 775. This provision is simply devoid of any objective meaning. Ordering compliance with applicable law adds nothing to the ipso facto obligation to comply with applicable laws, and is an idle provision. Further, it is not sufficient, in Edwin Cooper Inc.'s opinion, to be told to comply with a part whose application to this situation is questionable as a matter of law. Even assuming that it is applicable, EPA has not given much guidance as to what it requires. Nevertheless, we have attached as Exhibit B a notice that we believe is responsive to part 775, without conceding that part 775 applies.

Subparagraph E(iii) requires that a dust control plan be approved by EPA. Although not set off and denominated as such, the material submitted to date adequately addresses dust control. Specifically, refer to the revised project description attached as Exhibit A.

Subparagraph E(iv) requires a health and safety plan. This was submited on March 12, 1984. It was revised in accordance with EPA comments and resubmitted at our meeting on May 3, 1984.

Since all of the material requested by EPA has been submitted after consultation with EPA, there is no reason why the written approval specified by Paragraph E cannot be given today. We have attached as Exhibit C such an approval for a representative of U.S. EPA.

Paragraph 12(A)

This paragraph requires that a tarp or similar material be placed over what EPA has identified as area C. Edwin Cooper, Inc. had stated to EPA in the meeting on February 23-24, 1984 that this could be done, if the soil is in fact contaminated. Our sampling plan would determine this. But we have been prevented from doing this by EPA's inaction on our sampling plan. If the sampling establishes contamination of significance, Edwin Cooper, Inc. will address the problem. It is inappropriate to order the covering of [redacted] Area C without knowledge of the contamination.

Paragraph 12(B)

This paragraph requires that the piled earth in Area A be containerized, according to a protocol for dust control and for health and safety measures. Edwin Cooper, Inc. has

already submitted a plan that adequately addresses dust control and health and safety measures. So nothing further need be submitted.

We have disagreed with EPA, and reiterate again, our objection to the containerization. There is, to our knowledge, no site or method approved for disposal of soil contaminated with 2378-TCDD. Containerizing the piled earth only creates an additional problem of what to do with the containerized soil.

EPA provides an alternative to containerization by authorizing Edwin Cooper, Inc. to proceed with construction, if a plan is approved in accordance with the requirements of paragraph E, and if the piled earth is covered with a tarp. We have previously supplied our comments on paragraph E and demand that EPA review the plans previously submitted and that EPA approve those plans unless there are substantial deficiencies.

Further, if EPA approves those plans in an expeditious fashion, there is no need to cover the piled dirt. The 2378-TCDD has been present for 13 to 20 years and a few more days won't make any difference. The entire construction project authorized by paragraph E will be completed in a month's time. It is simply not warranted to cover the material for such a short time and then to remove the cover. It is especially nonsensical to require that a plan be submitted for covering the piled earth. The statement in the order that it be "of high quality,

shall be undamaged and without tears and shall be secured in such a manner to ensure its effectiveness in adverse weather" is a sufficient plan.

Paragraph 12(C)

This paragraph requires Edwin Cooper, Inc. to develop a proposal for further investigation. Edwin Cooper, Inc. had previously agreed in writing to provide this material.

Subparagraph C(i) requires a sampling plan. Such a plan, dated March 1, 1984, was submitted to EPA along with the project description. The plan was developed after discussion and, we thought, approval of the previous OSC. We have never received written comments on the plan. We have received oral comments and have prepared a revision of that plan which is attached as Exhibit D, to reflect those comments.

At EPA's insistence, Edwin Cooper, Inc. postponed taking the samples and performing the analysis described in the sampling plan until EPA reviewed the plan. Since the oral comments that were provided by EPA were general in nature and did not address the methods of taking or analyzing the samples, we have taken the samples and are having them analyzed rather than wait until EPA approves the revised plan. We would be in a better position today to discuss this order if EPA had provided timely review of the plan and not prevented the sampling.

Subparagraph (iii) requires a plan for identifying sewer lines, etc. which may be contaminated with 2378-TCDD. We had discussed this point with the first OSC and incorporated this concept into our sampling plan, which EPA has not acted upon. The sewers and pipe have been sealed off and are inaccessible except to the extent identified in our sampling plan. There is no good reason to disturb those closed sewers.

Subparagraph V requires a study of the history of the facility to identify areas of Agent Orange formulation. Since Edwin Cooper, Inc. did not formulate Agent Orange, this requirement is inappropriately addressed to Edwin Cooper, Inc. and should be addressed to Monsanto Co. We have provided oral descriptions of that formulation process and EPA is certainly aware of as much as we know about the site.

Subparagraph (VI) requires a health and safety plan and a quality assurance/quality control plan. The documents we have already provided EPA meet this requirement.

Determinations and Findings

Finding 1. Although Edwin Cooper, Inc. owns the land in question, Edwin Cooper, Inc. is not a potentially responsible party subject to a section 106(a) order. EPA did not order the residents of Times Beach, MO who had 2378-TCDD deposited on their land through no act of their own to take removal actions. There is precedent under CERCLA for an innocent land owner to be absolved of any responsibility under CERCLA. See City of Philadelphia vs. Stepan Chemical Co.

Finding 4. We are unaware of any "determination" CDC has made concerning the Edwin Cooper, Inc. site. Any such "determination" is an unlawful delegation of authority, inconsistent with CERCLA §109, Executive Order 12316 and the redelegation to the EPA Regional Administrator. If this reference is to CDC's so called "action level", that action level is derived from a potential exposure that is not like the potential exposure at the Edwin Cooper, Inc. plant.

To the extent that the order relies upon protection of employees to justify the order, there has been no "release" as defined in CERCLA §101(22). That is, CERCLA excludes from the definition of a release "any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons." Edwin Cooper, Inc.'s employees and the employees of Edwin Cooper, Inc.'s contractor can make such claims. There is no evidence that there has been any movement of 2378-TCDD outside of the workplace. Any assertion by EPA to the contrary is sheer speculation based on no fact at all. EPA has sampled off the plant site and has found no 2378-TCDD. 2378-TCDD adsorbs very strongly to soil particles and is essentially insoluble in water, and is soluble only in materials that have not been used at the site. Whatever 2378-TCDD has been deposited at the workplace is still there. For EPA to find otherwise is to ignore all the scientific information available at the site and to rely upon speculation built upon speculation.

Finding 7. Although there are private residences to the north, there is no evidence that they are or even may be exposed to 2378-TCDD.

Finding 10. The finding of an imminent and substantial endangerment is based on risks that are not real. Even though the 2378-TCDD has been at the site for many years, there is no evidence to support a finding that there has been any wind blown or runoff transmission of 2378-TCDD contaminated dirt. It is not reasonable to expect migration into the groundwater because of the insolubility of the 2378-TCDD in water or other material present at the site. Any reasonable risk of current wind blown transmission is eliminated by adherence to the dust control plan previously submitted.

RCRA §3013. Since 2378-TCDD is not a "hazardous waste" under rules promulgated by EPA pursuant to section 3001 of RCRA, there is no jurisdictional basis for a RCRA §3013 order. To the extent that a §3013 order is authorized, it should be addressed to the prior owner of the site, Monsanto Co., under the terms of §3013(b) of RCRA.

WHEREFORE, Edwin Cooper, Inc. respectfully requests that EPA 1) withdraw the order in docket V-W-84-007 as unnecessary; or 2) modify the mandatory and prohibitory portion of paragraph 12 of that order in accordance with the above comments and approve the plans previously submitted so that dispute over the jurisdictional bases of the order can be avoided; or 3) modify or vacate that order as beyond the authority of EPA.

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